Supreme Court, U.S.
FILED
JUL 8 1991
OFFICE OF THE CLERK

No. 91-38

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LINUS P. ROMEY,
PRIVATE FIRST CLASS, UNITED STATES ARMY,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

ALAN M. BOYD
Captain, Judge Advocate General's Corps (JAGC), United States Army
Defense Appellate Division
U.S. Army Legal Services Agency
5611 Columbia Pike
Falls Church, Virginia 22041
(703) 756-0569
Counsel of Record

ROBERT B. KIRBY
Colonel, JAGC
United States Army

MICHAEL J. KELLEHER
Major, JAGC
United States Army

ROBIN N. SWOPE
Captain, JAGC
United States Army
Counsel for Petitioner

QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS AGAINST HIM, WHERE THE EIGHT-YEAR-OLD CHILD WITNESS AGAINST PETITIONER WAS PERMITTED TO TESTIFY BY WHISPERING IN HER MOTHER'S EAR WHICH TESTIMONY HER MOTHER WOULD THEN REPEAT TO THE COURT, WHEN THE MILITARY JUDGE HEARD NO EVIDENCE AND MADE NO FINDINGS THAT SUCH ALTERNATE METHOD OF TESTIFYING WAS NECESSARY AS REQUIRED BY *MARYLAND V. CRAIG*, 497 U.S. ——, 110 S.Ct. 3157 (1990).

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF MILITARY APPEALS MISAPPLIED *CRAIG*'S HOLDING THAT A CASE-SPECIFIC FINDING OF NECESSITY IS REQUIRED BEFORE A DEFENDANT MAY BE DENIED THE RIGHT TO CONFRONT THE WITNESS AGAINST HIM	6
II. ERRONEOUS USE OF THE "THIRD-PARTY-WHISPER PROCEDURE" CANNOT BE CONSIDERED HARMLESS AS THERE IS NO OTHER EVIDENCE TO SUPPORT PETITIONER'S CONVICTION	12
CONCLUSION	14
APPENDIX A	1a
APPENDIX B	10a

TABLE OF AUTHORITIES

Cases: Page

Berger v. United States, 295 U.S. 78 (1935) 12
California v. Green, 399 U.S. 149 (1970) 7
Chapman v. California, 386 U.S. 18 (1967) 13
Coy v. Iowa, 487 U.S. 1012 (1988) ..... *passim*
Fahy v. Connecticut, 375 U.S. 85 (1963) 13
Maryland v. Craig, 497 U.S. ——, 110 S.Ct. 3157 (1990) ..... *passim*
Milton v. Wainwright, 407 U.S. 371 (1972) 13
Ohio v. Roberts, 448 U.S. 56 (1980) 7
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 9
Schneble v. United States, 405 U.S. 427 (1972) 13
United States v. Romey, 32 M.J. 180 (C.M.A. 1991) 1, 4, 5, 10
United States v. Romey, 29 M.J. 795 (A.C.M.R. 1989) 1, 13

Constitutional Provisions and Statutes:

United States Constitution Amendment VI ..... *passim*
Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*:
Article 32, 10 U.S.C. § 832 4
Article 39(a), 10 U.S.C. § 839(a) 4, 5
Article 125, 10 U.S.C. § 925 2
Article 134, 10 U.S.C. § 934 2
United States Code, 28 U.S.C. § 1259(3) (Supp. 1991) 2

Other Authorities:

5 Wigmore, Evidence § 1395 (Chadbourne rev. 1974) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ———

LINUS P. ROMEY,
PRIVATE FIRST CLASS, UNITED STATES ARMY,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Linus P. Romey, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 32 M.J. 180 (C.M.A. 1991) (Appendix A). The opinion of the Army Court of Military Review is reported at 29 M.J. 795 (A.C.M.R. 1989) (Appendix B).

JURISDICTION

The decision of the Court of Military Appeals was rendered on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1991).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

On February 2, 13, 14, and 15, 1989, petitioner was tried at Fort Ord, California, before a general court-martial composed of officer and enlisted members [hereinafter the "jury"].[1] Contrary to his pleas, petitioner was found guilty of sodomy with a child under 16 years of age and indecent assault, in violation of Uniform Code of Military Justice arts. 125 and 134, 10 U.S.C. §§ 925 and 934 (1982) [hereinafter UCMJ], respectively. The jury sentenced petitioner to a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction in grade from Private First Class to Private.

During the Government's case on the merits the alleged victim was called to testify (Record of Trial [hereinafter R.] 151). The child is petitioner's daughter and at the time of trial was nearly nine years old. After answering general questions from the prosecutor unrelated to the charges, the child became unresponsive when asked about petitioner's conduct toward her (R. 160-61). The prosecutor then asked the child if she would like to answer questions through her mother ("sort of whisper the

---

[1] Court-martial members are analogous to jurors.

answers in her ear") to which the child responded affirmatively (R. 161). The child did not respond when asked if she thought she could answer any questions without her mother (*id.*) The military judge then directed the prosecutor to question the child further (*id.*). When the child refused to answer two questions concerning the substance of the charges, the military judge had the mother brought into the courtroom (R. 162). Over objection from the defense counsel, Mrs. Romey, petitioner's wife, was brought in and seated immediately to the right of her daughter (R. 163). Mrs. Romey was instructed to repeat what the prosecutor said and then to repeat exactly what her daughter said without adding any other words (*id.*). Shortly thereafter, Mrs. Romey was sworn in as an interpreter; she was again reminded that she was to act strictly as an interpreter, that she could not ask any questions herself, and could only repeat what her daughter said (R. 166). The questioning then continued with the child answering by whispering her responses to her mother which her mother then repeated. No explanation or cautionary instruction was given to the jury.

This situation had been anticipated and discussed at an earlier session of trial (R. 148-50). The defense counsel objected to alternate methods of testifying as violating petitioner's Sixth Amendment right to confront the witness (R. 149). Ultimately the military judge offered the defense counsel a choice: the child could testify through the prosecutor or through her mother (R. 150). No other option was offered. The defense counsel indicated that he did not want the child to testify through the prosecutor (*id.*). The military judge made no detailed inquiry of the child, heard no testimony, and made no specific findings of fact that the alternate procedure was necessary before allowing the child to testify through her mother. There was also no evidence presented that the child could not speak or understand English, her native language.

The Court of Military Appeals held that there was no violation of the Sixth Amendment in petitioner's case. Recognizing that the right to confrontation is not absolute, the court stated that a defendant's rights may be satisfied if there is an adequate showing of necessity for an alternate method of testimonial presentation and if the reliability of such testimony is otherwise assured. 32 M.J. at 183. The court found that the military judge impliedly made the requisite finding of necessity in petitioner's case. This finding was, according to the court, based on the prosecutor's uncontroverted representations concerning the child's responses at the Article 32[2] hearing and his prior discussion with the child. Moreover, the military judge personally observed the child's refusal to answer questions at the Article 39(a)[3] session. The court concluded that necessity was established by the record so that no physical-confrontation violation occurred in the "third-party-whisper procedure" used in petitioner's case. *Id.*

The court also rejected the argument that Mrs. Romey's bias rendered the child's testimony unreliable. In support of its position the court found that Mrs. Romey was not an eyewitness to the charged offenses, that she did not provide any substantive testimony for the Government against petitioner, and that she testified for the defense on sentencing. The court also found that there was no evidence that Mrs. Romey had engaged in any extortious conduct toward petitioner; there was no particular challenge made at trial to the accuracy of her repetitions of the child's testimony; Mrs. Romey took the oath required for a somewhat analogous court-martial interpreter and was twice told by the military judge to repeat only what

---

[2] Article 32 of the UCMJ requires an investigation similar to a preliminary hearing to determine if there is sufficient evidence to try a defendant before a general court-martial.

[3] Article 39, UCMJ, authorizes sessions of the court-martial outside the presence of the jury.

the child said; and Mrs. Romey's responses were largely cumulative of the responses which the child eventually gave without use of the interpreter procedure. *Id.* at 183-84. Under the circumstances of petitioner's case, the court found "no unreliability or true unavailability for cross-examination or denial of due process . . ." *Id.* at 184. Nevertheless, the court noted that the record did not reflect an adequate effort to secure a more neutral party to act as an "interpreter" in petitioner's case. *Id.* at 183, n.2.

Petitioner was convicted of the offenses with which he was charged. The Army Court of Military Review issued its decision after this Court rendered its decision in *Coy* v. *Iowa*, 487 U.S. 1012 (1988), but before this Court decided *Maryland v. Craig*, 497 U.S. ——, 110 S.Ct. 3157 (1990). The Court of Military Appeals affirmed petitioner's conviction measuring the third-party-whisper procedure used in petitioner's case and the implied finding of necessity against the standards established in *Craig*. *Romey*, 32 M.J. at 183.

REASONS FOR GRANTING THE WRIT

In rendering its decision in petitioner's case, the Court of Military Appeals attempted to force the facts contained in the record into the standards set forth by this Court in *Craig*. *See Romey*, 32 M.J. at 183. The court found that the military judge impliedly made a finding of necessity on the basis of uncontroverted representations of the prosecutor concerning the child witness' prior responses at a pretrial hearing and the prosecutor's pretrial discussions with the child. Moreover, the court found that the military judge personally observed the witness' refusal to answer particular questions at an Article 39(a) session at this court-martial in the presence of petitioner. Finally, the court specifically found that necessity was established by the Government so there was no physical-confrontation violation in petitioner's case. *Id.*

Petitioner submits that there are significant distinctions between the facts of his case and those of *Craig* which the Court of Military Appeals failed to consider. Those distinctions rendered petitioner's court-martial fundamentally unfair. A writ of certiorari should be issued to permit this Court to determine what alternatives to face-to-face confrontation are allowed by the Sixth Amendment and whether an implied finding of necessity is permissible under *Craig*. Whether an alternate procedure such as the "third-party-whisper procedure" used in petitioner's case is permissible was left unanswered in *Craig*. Nevertheless, petitioner submits that the Court of Military Appeals misapplied *Craig* when holding that an implied finding of necessity is sufficient basis to deny petitioner his Sixth Amendment right to confrontation.

I. THE COURT OF MILITARY APPEALS MISAPPLIED *CRAIG*'S HOLDING THAT A CASE-SPECIFIC FINDING OF NECESSITY IS REQUIRED BEFORE A DEFENDANT MAY BE DENIED THE RIGHT TO CONFRONT THE WITNESS AGAINST HIM.

Craig recognized that criminal defendants do not have an absolute right to have a face-to-face meeting with the witnesses at trial. *Craig*, 110 S.Ct. at 3163. The central concern of the Confrontation Clause is to ensure the reliability of the evidence presented against a criminal defendant. The right guaranteed by the Confrontation Clause includes not only a personal examination of the witness, but also:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and]

> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. (citing *California v. Green*, 399 U.S 149, 158 (1970)). A careful application of these elements of confrontation to petitioner's case indicates that petitioner was denied his fundamental right to confront the main prosecution witness against him.

The child witness was present in court so petitioner was not denied the literal right to confront the witness against him because he could see the child and she could see him. The record also indicates that the child was sworn in as a witness (R. 151) and that she understood the difference between telling the truth and telling a lie (R. 152). The child did say that she would tell the truth, but there is no indication that she understood the seriousness of the matter or that she might be punished if she lied. The child was also not forced to submit to cross-examination (R. 173-86). The vast majority of relevant questions were answered through Mrs. Romey. The child failed to respond to relevant questions posed by the defense counsel and the court failed to encourage her or ask her to testify on her own. Petitioner did not have a "full and fair opportunity to probe and expose [testimonal] infirmities through cross-examination." *Craig*, 110 S.Ct. at 3164 (citing *Ohio v. Roberts*, 448 U.S. 56, 69 (1980)), because the child decided herself which questions she would answer personally and which questions she would answer through her mother. Finally, it was extremely difficult for the jury to accurately assess the witness' credibility because she was not directly responding to the questions. All the jury was able to see was the child answering in her mother's ear. Surely petitioner's Sixth Amendment rights mean more than that.

Mrs. Romey should not be seen as merely an interpreter for her daughter's testimony. Contrary to the characteri-

zations of the Court of Military Appeals, Mrs. Romey was a biased, emotionally involved, and non-neutral party to the proceedings. Mrs. Romey testified for the Government on its case-in-chief. She was later brought back in to act as an "interpreter" for her daughter. As the jury was given no cautionary instructions, it would only be natural that the jurors would give more weight to the child's testimony because another Government witness, her mother, was lending credence by her presence.

Mrs. Romey was more than a mother lending moral support to her daughter. Mrs. Romey was the person who first brought her daughter to the doctor; that visit resulted in the allegations against petitioner. After the allegations arose Mrs. Romey took the children and returned to Alaska. Throughout the investigation and trial Mrs. Romey never stated that she thought her daughter might be lying. The fact that Mrs. Romey and her daughter presented a united front against petitioner could not have been lost on the jurors. The defense counsel's failure to challenge the accuracy of Mrs. Romey's "translation" does not prove that she was neutral and unbiased. One cannot challenge the accuracy of something one cannot hear. Mrs. Romey also had to be cautioned twice by the military judge to repeat only what her daughter said. Finally, the responses given through Mrs. Romey were not cumulative—they were the heart of the case against petitioner. The fact that Mrs. Romey was later called as a defense witness during sentencing does not erase the taint during the findings portion of the trial.

Traditionally, interpreters are totally unbiased and uninvolved in the case. They are employees of the court whose only function is to translate what the counsel and witnesses say. As the child spoke English clearly and without an impediment there was no need for an interpreter. When translators are used the jury can still hear the witness respond in his or her own language be-

fore the interpreter translates into English. Furthermore, all the testimony would be on tape so someone could later verify that the interpreter had translated correctly. From the record in petitioner's case one simply has to trust that Mrs. Romey repeated the words exactly. Petitioner submits that is not sufficient in a matter this important. Finally, as a matter of fundamental and overall fairness, it is even more important to have a case-specific finding of necessity when a biased person is used as an "interpreter."

"The Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Coy*, 487 U.S. at 1017 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)). Taken literally, petitioner "confronted" his accuser because the child could see him and he could see her. Nevertheless, an impediment was there. In petitioner's case, it was not a barrier to vision, as in *Coy* or *Craig*, but a barrier to hearing and speech. The child's words were presented by and through her mother. The child's wording, phraseology, and manner of expression were all filtered through her mother. The child was essentially insulated from the proceedings. Therefore, petitioner's right to confront and cross-examine the true witness against him in a meaningful way was denied.

As Wigmore has stated:

> (1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 Wigmore, Evidence § 1395 at 150 (Chadbourne rev. 1974) (emphasis added).

Both *Coy* and *Craig* recognized that the right to face-to-face confrontation is not absolute and may give way to alternative forms of testimony if necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. *Craig*, 110 S.Ct. at 3166; *Coy*, 487 U.S. at 1021. *Craig* concluded that a State's interest in the physical and psychological well-being of alleged child abuse victims may be sufficiently important to outweigh, in some cases, a defendant's right to confrontation. 110 S.Ct. at 3167. The State is required to make an adequate showing of necessity before using special procedures that permit a child witness to testify against a defendant in the absence of face-to-face confrontation with the defendant. *Craig*, 110 S.Ct. at 3169. *Craig* held that the finding of necessity must be case specific and follow three basis guidelines:

> 1) alternate procedures must be necessary to protect the welfare of the particular child witness who seeks to testify;
>
> 2) the trial court must find that the child would be traumatized by the presence of the defendant, not by the courtroom in general; and
>
> 3) the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify.

Id.

The Court of Military Appeals found that the military judge *impliedly* made a finding of necessity in petitioner's case. It held that the finding was based on uncontroverted representations of the prosecutor concerning the child's behavior at earlier stages of the case and the military judge's own observations of the child's refusal to answer questions during the court-martial. *Romey*, 32 M.J. at 183. Such a holding is clearly contrary to *Craig*.

The military judge did not hear any evidence or make any specific findings of fact before determining that the

child would be allowed to whisper her answers in her mother's ear. The prosecutor merely stated that the child tended to become a bit quiet when the allegations were brought up (R. 148). When preliminary questions were asked about the allegations the child did not respond. After the child did not respond to four preliminary questions the military judge directed that the mother be brought in (R. 161-62). The Government did not call any social workers or child psychologists/psychiatrists to testify about the child's mental state. There was also no evidence presented that the child witness was or would be traumatized by petitioner's presence. Any number of reasons could explain why the child was reluctant to answer questions—perhaps she did not want to say anything against her father, she may have been shy or intimidated by the panel of male jurors whom she did not know, or she may have been embarrassed to talk about personal matters in front of men or strangers. Whatever the reasons may have been, the Government did not establish that it was petitioner's presence which caused the silence. Finally, there was no evidence presented that the emotional distress suffered by the child would be such that she would have been unable to testify against petitioner. No evidence was presented that her reluctance resulted from any trauma caused by petitioner's presence. The Government established only that the child was reluctant to answer questions.

Unlike *Coy* and *Craig*, the military has no specific statute or procedure authorizing abridgement of the right of confrontation. In the absence of such a statute it is even more important that the Government justify such a procedure as was used in petitioner's case. *Craig* requires a case-specific finding of necessity before an alternate form of testimony is allowed. When an important constitutional right is involved, implied findings of necessity are insufficient to support a denial of rights.

An implied finding of necessity (if that is, in fact, what the military judge made) is not sufficient to warrant such

a radical departure from *Craig* and *Coy*. This Court's holdings are clear: a case-specific finding of necessity is required before a defendant may be deprived of his right to confront the witnesses against him. The Court of Military Appeals has put the military courts on a very slippery slope. An implied finding of necessity puts the state of the law back squarely where it was before *Coy*—allowing the prosecution the presumption of necessity rather than requiring such a showing. *Craig* has a simple, clear-cut rule. The decision in petitioner's case muddies the waters and deprives soldiers of the protection of *Craig* and *Coy*.

Factually, petitioner's case is very similar to *Coy*. In both cases the trial court presumed necessity and authorized a procedure that violated the defendant's right to confront his accusers. Unlike *Coy*, however, the military judge in petitioner's case did not caution the jury that they could not draw an inference of guilt from the "third-party-whisper procedure" which permitted the child to testify through her mother. The cumulative effect of the procedure used and the decision of the military judge to authorize such a procedure essentially nullified petitioner's Sixth Amendment right to confront the witness against him. *Cf. Berger v. United States*, 295 U.S. 78 (1935) (probable cumulative effect upon jury of pronounced and persistent prosecutorial misconduct could not be disregarded as inconsequential).

II. ERRONEOUS USE OF THE "THIRD-PARTY-WHISPER PROCEDURE" CANNOT BE CONSIDERED HARMLESS AS THERE IS NO OTHER EVIDENCE TO SUPPORT PETITIONER'S CONVICTION.

In *Coy*, this Court held that denial of Confrontation Clause rights is subject to a harmless error analysis. *Id.*, 487 U.S. at 1021. When a federal constitutional error has been noted, reversal is required unless the reviewing court is able "to declare a belief that [the error] was

harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Under *Coy* the "assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Id.*, 487 U.S. at 1021. Therefore, the question is whether the remaining evidence is sufficient to establish the defendant's guilt beyond a reasonable doubt. This standard mandates that the appellate court find that the error was harmless beyond a reasonable doubt and, therefore, did not effect the jury's decision. *See Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. United States*, 405 U.S. 427 (1972).

It is clear that the other evidence in the case was insufficient to establish petitioner's guilt beyond a reasonable doubt. As the Army Court of Military Review recognized "[e]ssentially all answers related to sodomy and indecent assault were . . . communicated through the mother. The same procedure was used during cross-examination." *Romey*, 29 M.J. at 796. Nevertheless, as this Court has stated, the true question is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

In petitioner's case, the affected testimony was that of the alleged victim. Her testimony was the only evidence presented on the question of guilt or innocence. Without her testimony petitioner could not have been convicted. As there is no remaining evidence to support petitioner's conviction, the erroneous use of the "third-party-whisper procedure" cannot be considered harmless. Allowing an eight-year-old child to testify through her mother without a case-specific finding of necessity was prejudicial error which denied petitioner his Sixth Amendment right to confront the witness against him.

CONCLUSION

Petitioner was denied his Sixth Amendment right to confront the witness against him. The denial of this right was based on a misapplication of this Court's holdings in *Maryland v. Craig* and *Coy v. Iowa*. This case provides this Court with the opportunity to answer questions left unanswered in *Craig*: whether an implied finding of necessity is sufficient to support a denial of the Sixth Amendment right to confront witnesses and what alternatives to face-to-face confrontation are allowed under the Sixth Amendment. For those reasons, petitioner submits that his case warrants review by this Court. Therefore, the petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ALAN M. BOYD
Captain, Judge Advocate General's Corps (JAGC), United States Army
Defense Appellate Division
U.S. Army Legal Services Agency
5611 Columbia Pike
Falls Church, Virginia 22041
(703) 756-0569
Counsel of Record

ROBERT B. KIRBY
Colonel, JAGC
United States Army

MICHAEL J. KELLEHER
Major, JAGC
United States Army

ROBIN N. SWOPE
Captain, JAGC
United States Army
Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

NO. 63,996
CM 8900465

UNITED STATES,
Appellee

v.

LINUS P. ROMEY, PRIVATE FIRST CLASS, U.S. ARMY,
Appellant

April 11, 1991

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a general court-martial at Fort Ord, California, in February 1989. Contrary to his pleas, the members of this court-martial found him guilty of sodomy with a child under 16 and indecent assault on that same child, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 20 years, total forfeitures, and reduction to pay grade E-1. The convening authority approved the sentence. On November 15, 1989, the Court of Military Review affirmed the findings of guilty and the sentence. 29 MJ 795.

This Court granted review on the following questions of law:

I.

WHETHER APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS DENIED WHEN THE ALLEGED CHILD-VICTIM TESTIFIED THROUGH HER MOTHER AND WAS NOT TRULY AVAILABLE FOR CROSS-EXAMINATION.

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY INSTRUCTING ON SENTENCING THAT THE MEMBERS COULD CONSIDER MATTERS IN AGGRAVATION NOT IN EVIDENCE.

We hold that the third-party-whisper procedure used in this case did not violate appellant's constitutional rights. *See generally Maryland v. Craig*, 497 U.S. ——, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *United States v. Batten*, 31 MJ 205 (CMA 1990). Moreover, the purported error on sentencing, if error at all, was harmless. Art. 59(a), UCMJ, 10 USC § 859(a).

The Court of Military Review found the following facts:

> In August of 1988, Mrs. Melanie Romey, mother of the victim, S, discovered blisters around S's anus while teaching her the proper way to bathe. Mrs. Romey immediately brought S to their family doctor, a military physician. The doctor examined the rash, molluscum contagiosum, and called a dermatologist to confirm his diagnosis. Because the rash was in the genital area, child abuse was suspected. The doctor asked S if she had been touched by anyone. S responded by saying "No one but daddy."
>
> Appellant was the sole caretaker of his daughter, S (age 8) and son B (age 5), from 1 January through 1 June 1988. For financial reasons, Mrs.

Romey worked and lived in Alaska. It was alleged that during this period appellant told his daughter that he would teach her "how not to get pregnant." He forced S to masturbate him until he ejaculated and to perform oral copulation. Appellant inserted his finger in S's vagina and licked her vagina.

At trial, the government called three witnesses, the examining doctor, the victim's mother, and S. The doctor testified in regard to his examination of the rash and S's response, "No one but daddy," to his question, "Has anybody been touching you down there or doing anything?"

S's mother testified as to S's age and that both of her children were living with appellant while she was working in Alaska during the period 1 January through 1 June 1988 (the period of the charged offense).

Prior to S's testimony, trial counsel indicated to the judge that S was reluctant to talk about the charged incidents. S had, in the past, communicated information about the charged offenses by whispering to her mother or a social worker. Another method of communication was for her to draw pictures. It was the trial counsel's opinion that S would not answer directly in court except as to peripheral matters. In an attempt to familiarize her with the courtroom and various participants, S was called and asked questions out of the presence of the court members. The court members then were called and formal questioning began. S answered general questions with little difficulty and identified her father and the place and period of time she lived with her father while her mother was in Alaska. When S was asked, "What are we going to talk about [today]?" she failed to respond. S responded affirmatively when asked if she would like to talk through

her mother by "Sort of whisper[ing] the answer in her [mother's] ear."

The military judge received no response when he asked S if she thought she could answer any questions without her mother but directed trial counsel to try without the mother. The witness again answered some preliminary questions but did not respond when asked "Do you remember what daddy was teaching you?" The military judge, without making a formal finding that S needed assistance, directed, over defense objection, that S's mother be brought in.

Mrs. Romey was seated to the right of her daughter and instructed to repeat only the trial counsel's questions and her daughter's answers "without any other words." Thereafter, Mrs. Romey acted essentially as an interpreter with S whispering her answer to her mother who then gave the answer to the court. Shortly after this method began, Mrs. Romey was sworn as an interpreter by the trial counsel. Essentially all answers related to sodomy or indecent assault were thereafter communicated through the mother. The same procedure was used during cross-examination.

29 MJ at 795-96.

I

The first granted issue broadly suggests that the presentation of the daughter's direct testimony through the words of her mother violated appellant's Sixth Amendment right to physically confront the witnesses against him. *See generally Coy v. Iowa*, 487 U.S. 1012, 1017, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988). It additionally aserts that this testimonial method violated the Sixth Amendment because a witness subjected to it cannot be considered "truly available for cross-examination." *See generally United States v. Owens*, 484 U.S 554, 108

S.Ct. 838, 98 L.Ed.2d 951 (1988). Appellant claims that neither of these infringements of his Sixth Amendment right to confrontation was justified by any specific finding of public necessity by the judge. *See Maryland v. Craig*, *supra* at 3169; *Coy v. Iowa*, *supra* at 1020-21, 108 S.Ct. at 2802-03. Finally, he asserts that the child's testimony presented in this form was inadmissible hearsay which did not meet the Sixth Amendment standards of unavailability required for admission of such evidence at a criminal trial. *See Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 597 (1980); *United States v. Ferdinand*, 29 MJ 164 (CMA 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990).[1]

The defense brief somewhat expands upon this granted issue and raises Fifth Amendment objections to the third-party-whisper procedure. Counsel contends that it was fundamentally unfair to permit the victim's mother, who he asserts may have been biased in her child's favor, to perform the function of interpreter. *See generally Prince v. Beto*, 426 F.2d 875 (5th Cir.1970). Also, he asserts that appellant was denied due process of law because the mother's actions as an interpreter in this case unfairly bolstered the child's testimony against him. *See State v. Suka*, 70 Haw. 472, 777 P.2d 240 (1989).

The first question before us is whether the third-party-whisper procedure employed in this case constituted a face-to-face meeting of appellant with his child accuser before the trier of fact as contemplated by the Sixth Amendment. *See generally Coy v. Iowa*, *supra* at 1016, 108 S.Ct. at 2800. The Supreme Court has construed the confrontation language of the Sixth Amendment literally, and we see no reason to depart from this precedent in this case. Here, portions of the child-victim's testimony were heard only by her mother. To this

---

[1] No authority is cited by appellant for this argument. *Contra* 2 Wharton's *Criminal Evidence* § 375 at 500 (C. Tortia 14th ed. 1986).

extent, her testimony was not physically before appellant or the members of the court. *Id.*

Of course, it is well established that the Sixth Amendment does not absolutely entitle an accused in a criminal trial to a face-to-face meeting with every witness against him. An accused's rights in this regard may be satisfied if there was an adequate showing of necessity for an alternate method of testimonial presentation and the reliability of such testimony is otherwise assured. *See generally Maryland v. Craig, supra* at 3166; *Coy v. Iowa, supra* at 1020-21, 108 S.Ct. at 2802-03; *United States v. Batten*, 31 MJ at 210-11; and *United States v. Thompson*, 31 MJ 168, 173 (CMA 1990).

The judge impliedly made a necessity finding in this case. He did so on the basis of the uncontroverted representations of trial counsel concerning the child witness' prior responses at the investigation under Article 32, UCMJ, 10 USC § 832, in this case and his pretrial discussions with this same witness. The judge also personally observed the witness' refusal to answer particular questions at an Article 39(a), UCMJ, 10 USC § 839(a), session at this court-martial in the presence of appellant. In this context, we find necessity was established by the prosecution, so no physical-confrontation violation occurred in employing this procedure. *See generally Maryland v. Craig, supra* 110 S.Ct. at 3169.

Appellant's suggestion that the interpreter's bias rendered this testimony otherwise unreliable must also be rejected. *See generally State v. Van Pham*, 234 Kan. 649, 675 P.2d 848 (1984). First, Mrs. Romey was not an eye witness to the charged offenses, and she did not provide any substantive testimony for the Government against her husband. In fact she testified for the defense on sentencing. *State v. McLellan*, 56 N.C.App. 101, 286 S.E.2d 873, 875 (1982); *Green v. State*, 260 A.2d 706

(Del.1969).[2] Second, there was no evidence that Mrs. Romey engaged in any extortious conduct toward her husband at this court-martial or outside of it. *Cf. Prince v. Beto*, *supra*, 426 F.2d 875. Third, there was no particular challenge made at trial to the accuracy of her repetitions of the child's testimony. *State v. McLellan*, *supra* at 876. Fourth, she took the oath required for a somewhat analogous court-martial interpreter and twice was told by the judge to repeat only what the child said. Finally, Mrs. Romey's responses were largely cumulative of the responses which the child eventually managed to make at this trial without use of the interpreter procedure. We find no unreliability or true unavailability for cross-examination or denial of due process in this context. *See generally People v. Vandiver*, 127 Ill.App.3d 63, 82 Ill. Dec. 192, 196, 468 N.E.2d 454, 458 (1984); *People v. Spencer*, 119 Ill.App.3d 971, 75 Ill. Dec. 479, 484-85, 457 N.E.2d 473, 478-79 (1983).

Appellant's Fifth Amendment claim of unfair bolstering we also find most unpersuasive in this case. *See also Coy v. Iowa*, *supra* 487 U.S. at 1015, 108 S.Ct. at 2799-2800. The alleged victim was an 8-year-old girl, and limited testimonial assistance was provided to her by her mother. *Cf. State v. Saka*, 777 P.2d at 242 n.1. The mother herself did not provide any critical testimony against her husband at this trial since she acknowledged her absence from the home during the period the alleged crimes occurred. *See Baxter v. State*, 522 N.E.2d 362, 365 (Ind. 1988). Finally, the need for the mother's assistance was apparent on the face of the record, and it was accomplished in a neutral fashion. *See Ricketts v. State*, 498 N.E.2d 1222, 1223 (Ind.1986). In these circumstances we perceive no reasonable possibility that the mother's

[2] We find that the record does not reflect an adequate effort to secure a more neutral party in this case. Such error we hold was harmless for the reasons stated in the text. *See State v. Givens*, 719 S.W.2d 25, 27 (Mo. App. 1986).

participation in this process could be viewed as an endorsement of the daughter's story or her credibility.

II

The second granted issue in this case concerns the judge's decision to give the following instruction on sentencing:

> In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after the findings. In particular, I call your attention to the testimony of two witnesses before findings, Sergeant Matthews and Captain Morgan, as to the accused's good soldierly abilities and you should certainly consider that. In addition, you have the accused's 2A and 2-1 forms and you should carefully consider all the matters on those two forms. *In addition, in aggravation, you should consider the nature and extent of injuries, whether physical or mental, psychological, that is suffered by the victim in this case.*

(Emphasis added.) Defense counsel objected to this instruction after it was given by the judge. He asserted that no evidence of physical, mental, or psychological damage to the victim was admitted at this trial. Trial counsel disagreed and said, "[Y]ou don't have to be a brain surgeon to know that any child that has been abused is going to have some type of emotional scarring . . . both now and for the rest of her life and I think the jury can draw on their common sense and experience. . . ."

In resolving this question, we first note that the instruction is phrased in the alternative, and it was not necessary that physical and mental and psychological damage all be evidenced. In this light, the obvious problems of the child in testifying in this case could reasonably be considered as some circumstantial evidence that she was mentally or psychologically affected by these offenses. *See generally*

Mil.R.Evid. 401 and 402, Manual for Courts-Martial, United States, 1984. While expert testimony would have been more appropriate on this issue, these matters need not be ignored by the members in reaching an appropriate sentence. *See* RCM 1001(f)(2)(B), Manual, *supra*. *See also* Mil.R.Evid. 701. In any event, the challenged instruction was general in nature and was virtually unexploited by the prosecution.[3] In this context, a finding of substantial prejudice cannot be sustained. Art. 59(a). *See United States v. Fontenot*, 29 MJ 244, 252 (CMA 1989).

The decision of the United States Army Court of Military Review is affirmed.

Judge COX and Senior Judge EVERETT concur.

[3] "It's the Government's position that these offenses, the memory of these acts that he did to her will stay with her for a very, very long time, more likely than not until she goes to her grave."

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

ACMR 8900465

UNITED STATES,
Appellee

v.

PRIVATE FIRST CLASS LINUS P. ROMEY,
574-54-8369, UNITED STATES ARMY,
Appellant

November 15, 1989

Before FOREMAN, SMITH and VARO, Appellate Military Judges.

OPINION OF THE COURT

SMITH, Judge:

On 2, 13, 14, and 15 February 1989, the appellant was tried by a general court-martial composed of officer and enlisted members at Ford Ord, California. Contrary to his pleas, the appellant was convicted of sodomy with a child under the age of 16 years and indecent assault, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934 (1982) [hereinafter UCMJ]. The convening authority approved his sentence of a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to Private E1.

I

In August of 1988, Mrs. Melanie Romey, mother of the victim, S, discovered blisters around S's anus while teaching her the proper way to bathe. Mrs. Romey immediately brought S to their family doctor, a military physician. The doctor examined the rash, molluscum contagiosum, and called a dermatologist to confirm his diagnosis. Because the rash [1] was in the genital area, child abuse was suspected. The doctor asked S if she had been touched by anyone. S responded by saying "No one but daddy."

Appellant was the sole caretaker of his daughter, S (age 8) and son B (age 5), from 1 January through 1 June 1988. For financial reasons, Mrs. Romey worked and lived in Alaska. It was alleged that during this period appellant told his daughter that he would teach her "how not to get pregnant." He forced S to masturbate him until he ejaculated and to perform oral copulation. Appellant inserted his finger in S's vagina and licked her vagina.

At trial, the government called three witnesses, the examining doctor, the victim's mother, and S. The doctor testified in regard to his examination of the rash and S's response, "No one but daddy," to his question, "Has anybody been touching you down there or doing anything?"

S's mother testified as to S's age and that both of her children were living with appellant while she was working in Alaska during the period 1 January through 1 June 1988 (the period of the charged offense).

---

[1] It was stipulated at trial that the appellant was examined on 9 February 1989 and had no "symptoms or pathology for molluscum contagiosum." Further the court members were instructed by the trial judge that the rash was "not related to any offense charged and cannot be considered when arriving at your decision regarding the offenses charged."

Prior to S's testimony, trial counsel indicated to the judge that S was reluctant to talk about the charged incidents. S had, in the past, communicated information about the charged offenses by whispering to her mother or a social worker. Another method of communication was for her to draw pictures. It was the trial counsel's opinion that S would not answer directly in court except as to peripheral matters. In an attempt to familiarize her with the courtroom and various participants, S was called and asked questions out of the presence of the court members. The court members then were called and formal questioning began. S answered general questions with little difficulty and identified her father and the place and period of time she lived with her father while her mother was in Alaska. When S was asked, "What are we going to talk about [today]?" she failed to respond. S responded affirmatively when asked if she would like to talk through her mother by "Sort of whisper[ing] the answer in her [mother's] ear."

The military judge received no response when he asked S if she thought she could answer any questions without her mother but directed trial counsel to try without the mother. The witness again answered some preliminary questions but did not respond when asked "Do you remember what daddy was teaching you?" The military judge, without making a formal finding that S needed assistance, directed, over defense objection, that S's mother be brought in.

Mrs. Romey was seated to the right of her daughter and instructed to repeat only the trial counsel's questions and her daughter's answers "without any other words." Thereafter, Mrs. Romey acted essentially as an interpreter with S whispering her answer to her mother who then gave the answer to the court. Shortly after this method began, Mrs. Romey was sworn as an interpreter by the trial counsel. Essentially all answers related to sodomy or indecent assault were thereafter

communicated through the mother. The same procedure was used during cross-examination.

Appellant assigns, *inter alia*, the following error on appeal:

> APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS WAS DENIED WHEN THE ALLEGED VICTIM TESTIFIED THROUGH HER MOTHER AND WAS NOT AVAILABLE FOR CROSS-EXAMINATION.

Relying on *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) and *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (cases emphasizing the right of an accused to physically confront a witness), appellant argues that the method employed was impermissible because it was possible that Mrs. Romey changed her daughter's answers and because "his right to confront and cross-examine the true witness against him in a meaningful way was denied." Appellant further "contends that the witness was afforded special 'protections' when no specific finding was made that the witness needed such protection." We disagree.

The confrontation clause requires that facts to be established by witnesses be proved "by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890, 894 (1899). In other words, there must be no barrier preventing the victim from viewing an accused or an accused from viewing the victim. An environment must exist that allows the court members to evaluate the effect of confrontation on the accused and the witness. We find under the facts of this case that appellant was not denied his right of physical confrontation. The procedure used afforded ap-

pellant that right throughout both direct and cross-examination and the confrontation was in clear view of the court members. The military judge made no "specific" finding that S required the assistance of her mother, however, his directions to the trial counsel and questioning of S indicate that he proceeded with the objected to method only after concluding that S would not be able to testify without her mother. We find his conclusion supported by the evidence of record.

Appellant also contends that S was unavailable for cross-examination. Our review of the record indicates that S personally responded to all but one of the defense counsel's fifty-two questions on cross-examination and twenty-five questions on recross-examination. If defense counsel avoided direct questions in regard to the criminal acts, it was a tactical decision as an effective mechanism to obtain answers was available. Appellant was not limited in the scope or nature of cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 18-19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15, 18-19 (1985) (confrontation clause requirements are met if the defense has a full and fair opportunity to probe and expose infirmities in a witness' testimony). We hold that appellant's sixth amendment right to cross-examination was not impaired.

Appellant also objects to the use of Mrs. Romey to relay answers stating that "there is nothing in the record suggesting that anyone but the mother could overhear the child's words" and "that it was entirely possible that the daughter's words were changed by the mother." We find this assertion more troublesome and view the situation as a due process question of an appointment of a possibly biased interpreter. *Cf. United States v. Schuring*, 16 M.J. 664 (A.C.M.R.1983) (employee of Camp Humphrey's criminal investigation command was not disqualified to act as an interpreter at trial where he did not previously participate in the case and his translations accurately reflected witnesses' testimony), *petition*

denied, 17 M.J. 287 (C.M.A.1984); *Prince v. Beto*, 426 F.2d 875 (5th Cir.1970) (appointment of the husband of a deaf mute as an interpreter for his wife, a victim of an attempted rape, constituted fundamental unfairness and violated due process). In this case, Mrs. Romey was clearly very much interested in continuing her marriage and keeping her family intact. Indeed she was called as a defense witness during the sentencing phase of the trial and testified that she wanted her husband to receive counseling, did not believe the conduct would be repeated, and that it was still important for her two children to have their father available. During the government's case, Mrs. Romey's testimony was essentially neutral. We find no reason to believe Mrs. Romey's "interpretation" was inaccurate or that she was biased. Accordingly, we find that the procedure used here was not fundamentally unfair, resulted in an accurate record of trial, and was not, therefore, a violation of due process.

We have considered the other errors asserted, including the error personally raised by appellant, and find them to be without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge FOREMAN and Judge VARO concur.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 297195 62120